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Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties

Citation for published version:

Carr, D 2011, 'Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*', *Edinburgh Law Review*, vol. 15, no. 2, pp. 320-21. <https://doi.org/10.3366/elr.2011.0041>

Digital Object Identifier (DOI):

[10.3366/elr.2011.0041](https://doi.org/10.3366/elr.2011.0041)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

©Carr, D. (2011). Matthew Conaglen, FIDUCIARY LOYALTY. PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES. *Edinburgh Law Review*, 15, 320-21doi: 10.3366/elr.2011.0041

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EdinLR Vol 15 pp 320-321
DOI: 10.3366/elr.2011.0041

Matthew Conaglen, FIDUCIARY LOYALTY. PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES

Oxford: Hart Publishing (www.hartpub.com), 2010. xliv + 287 pp. ISBN 9781841135830. £50.

Disagreements and questions about the fundamental nature of fiduciary liability have been extant for a good number of years now in academic circles. In the world of practice, lawyers and judges have traditionally been less concerned about conceptual and taxonomical explanations of what really underpins the fluctuating rules concerning the identification and regulation of this class of legal persons known as “fiduciaries”. That stance has been changing in recent times, however, and this text provides ample justification, alongside a cultivated and critical account of the importance of taxonomy generally, for the importance that is to be accorded to the search for conceptual certainty.

Another relatively recent development has been the central emphasis placed upon the concept of “loyalty” as the core normative driver of the law regulating fiduciaries. As intuitively attractive as the idea of “loyalty” is, as a base value for a body of laws, it is one which lacks a sharpness required for more detailed doctrinal rule building. This carefully argued monograph takes a novel and conceptually subtle approach to explaining the significance of fiduciary loyalty. It represents a sophisticated attempt to explain how more detailed rules can be synthesised in an approach that focuses on fiduciary law’s underlying normative imperative of loyalty, both in terms of its content and its systemic significance.

In examining the nature of fiduciary loyalty, and thereby seeking broader instruction, the text subjects certain rules of equity to sustained analysis. It does so not just by pondering the content of disparate rules that attach to commonly identified fiduciary offices. Rather, the exercise is a more ambitious one – by aggregating the individual rules in pursuit of their underlying basis the text moves towards explaining why fiduciary duties exist – and hence advances a more profound argument. This is that the concept of fiduciary loyalty conveniently denotes a juridical reservoir for a discrete and interstitially connected series of principles that serve a broader instrumental purpose. They exist to ensure that a fiduciary will fulfil his *non-fiduciary* duties appropriately. In other words, fiduciary duties, derived from the concept of loyalty, are symbiotically linked to non-fiduciary duties – their very existence is to ensure that a fiduciary complies with their existing legal duties.

The argument which underpins Dr Conaglen’s auxiliary theory of fiduciary duties is tightly made from the outset, with an impressively well-considered second chapter that diagnoses the traditional weaknesses of previous theories of fiduciary law. More particularly, the text is sensitive to the occasional tendency to treat Common Law jurisdictions as sharing a monolithic approach, itself a misunderstanding not made clearer by leading decisions of the Privy Council in the area. The approaches are often similar, but cannot be said to be uniform, and some jurisdictions differ more markedly than others. This is an area of law that is particularly policy-loaded, given the importance of how obligations are classified as regards remedial options among other things, and hence differences should not come as a surprise.

The scope for difference between apparently similar jurisdictions carries as much, or as little, weight in relation to Scots law as it does for more traditional Common Law jurisdictions. Dr Conaglen’s text seeks to subject English and Australian law to sustained analysis, and to make incidental references to other jurisdictions. Thus, a Scottish lawyer using the book cannot be heard to complain about the lack of a specifically Scottish analysis as the text makes no claim to consider Scottish law. The extent to which Scottish law could follow the analysis set

out by Dr Conaglen is unclear to an extent, though one must say that any such ambiguity would in practical terms be one of degree. It is clear that many of the practically functional rules relating to fiduciaries in Scotland and England are extremely similar if not identical, with the (possibly diminishing) exception of remedial responses. In terms of the theoretical fit of Dr Conaglen's theory of fiduciary duties to Scottish law there is arguably more tension as a result of the absence of an intellectually distinct equity jurisdiction. Yet, that appears not to be necessarily fatal to a potential Scottish reception of Dr Conaglen's auxiliary theory of fiduciary relations – the fact that fiduciary rules in England arose within the Court of Chancery does not mean that Scots law, if it should be so inclined, could not recognise *sui generis* an ex lege collection of duties that would perform a similar auxiliary role in relation to the classical categories of legal duty. The fundamental nature of such ex lege duties, and indeed where they came from, would present a more ticklish question but not an insurmountable obstacle to following Dr Conaglen's analysis.

The text is not only concerned with situating fiduciary law within the broad vista of private law at a taxonomical level. One of the greatest strengths of the text is the way that analysis of the operation of rules in discrete and specific situations simultaneously sustains and is subsumed within the broader classificatory objective. Chapter 5 in particular is permeated by clarity of analysis in the way it teases out conceptual differences between prohibitions on making a profit, conflicts of interest and the fair dealing rule. Furthermore, chapter 6 reflects upon the manner in which a fiduciary's potentially multiple duties interact with each other, thus providing a useful account of potential difficulties that may arise in such situations.

As ever with monographs from Hart, the text is handsomely presented at a reasonable price, and a paperback edition is due to appear in August 2011 at an even more reasonable price. This monograph is a superb example of doctrinal private law writing, a fact recognised by the award of the SLS Peter Birks Second Prize for Outstanding Legal Scholarship 2010. It will be of interest to academics and some practitioners seeking a deeper understanding of the formative forces of fiduciary law, and it would be a strong addition to a reading list for advanced students. For academics with an interest in fiduciary law, whether they agree with Dr Conaglen's thesis or not (there are those who do not: Rebecca Lee, Lionel Smith, and Joshua Getzler for example) it is a *sine qua non* to which we must all respond.

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EdinLR Vol 15 pp 321-322
DOI: 10.3366/elr.2011.0042

SET-OFF LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK. Ed by William Johnston and Thomas Werlen

Oxford: Oxford University Press (www.oup.co.uk), 2nd edn, 2010. lxxi + 576 pp. ISBN 9780199579716. £165.

"Set-off", it is commonly said, is not a term of art in Scots law. The result has been a focus on particular types of set-off. Compensation, for instance, is covered in the commendably concise – contemporary law reformers, take heed – Compensation Act 1592 (APS, III, 573, c 61; RPS 1592/4/83). "A just and positive statute," Lord Cunninghame remarked of it, "most creditable to the wisdom and sound views of the ancient Scottish legislature" (*Donaldson v Donaldson* (1852) 14 D 849 at 855). But the focus on compensation is to some extent unfortunate, not least because compensation is relatively unusual. Although it may be fair to say that compensation is a doctrine of the substantive law, compensation under the 1592